No. 11420

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. PORTER, Administrator, Office of Price Administration, *Appellant*,

vs.

DOROTHY HANSCOM and R. C. HANSCOM, d/b/a Dorothy Hanscom's, a Co-partnership, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEES

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STATEMENT OF FACTS

Prior to September 14, 1944, the defendants in this case were operating a retail business in which they offered for sale misses' and women's clothing. At that time the defendants' business was governed by Maximum Price Regulation No. 330 issued by the Office of Price Administration. The defendants had previously filed pricing charts based on those of their closest competitors, about which pricing charts there is no question (R. 5).

Shortly after September 14, 1944, and in due course of mail, the defendants received a communication from the District Price Executive, Mr. R. C. Mills, informing them as follows:

> "Revised Maximum Price Regulation No. 330 which governs the maximum prices to be charged for women's, children's and misses' outer wear garments has just been issued and is effective September 18, 1944.
>
> "According to this revised regulation it is necessary that you file two signed copies of the pricing chart which you have previously prepared in conformance with Maximum Price Regulation No. 330 * * * by October 15, 1944 * * *. On and after November 15, 1944, you may not sell any garments subject to this regulation unless you have received an acknowledgment from the OPA of the filing of your pricing chart * * *." (R. 6)

On October 7, 1944, the defendants received a second communication from the District Price Executive, Mr. R. C. Mills, which reads exactly the same as that communication of September 14, 1944 (R. 7).

The defendants filed copies of their pricing chart as required by the above two communications on October 12. On October 14 the defendants received an acknowledgement of these filings (R. 8).

At no time prior to October 15 was a copy of Revised Maximum Price Regulation No. 330 available to the defendants (R. 9).

The defendants heard nothing from the Office of

Price Administration with reference to the above matter until a little more than a year later when under date of November 26, 1945, the Seattle District Director advised the defendants that their pricing chart had been erroneously compiled and that they should have used the first four months of the operation of their business as a base instead of using the base as directed by the letters above referred to. Upon receipt of this last mentioned communication the defendants promptly complied and changed their base to conform with these last directions (R. 10).

The Administrator then filed his complaint for triple damages without alleging an amount (R. 2).

After the defendants had answered the parties entered into two stipulations (R. 15 and 19) in which they agreed on the amount of the overcharges, if any, and that the overcharges, if any, were not willfully made or made through failure to exercise due precaution, and that the Administrator would not ask for triple damages. The parties then further stipulated that all facts in the answer are true except that Reed C. Mills and Ruth Sollie were duly authorized and empowered representatives of the plaintiff and were acting within the scope of their authority in sending the above referred to communications; and then defined the issues in the case as whether or not Mr. Mills, the District Price Executive, and Ruth Sollie of the Apparel Section acted within the scope of their authority in sending to the defendants the communications of September 14, 1944, and October 7, 1944, and whether the defendants were required to comply literally with the instructions contained in

these communications and whether the defendants were justified in complying with these instructions, and whether the defendants' compliance with these instructions constituted a defense.

The Administrator then moved for a judgment on the pleadings which was denied (R. 18). At the trial the appellant refused to offer evidence (R. 31). The defendants then proceeded with their case, at the close of which the court gave his decision for the defendants (R. 21).

ARGUMENT

IT IS THE CONTENTION OF THE DEFENDANTS THAT THE COMMUNICATIONS OF SEPTEMBER 14, 1944, AND OCTOBER 7, 1944, ABOVE REFERRED TO, WERE ORDERS TO BE COMPLIED WITH; THAT THE OFFICE OF PRICE ADMINISTRATION HAD AMPLE AUTHORITY TO ISSUE THEM; AND THAT THE DEFENDANTS HAD EVERY RIGHT TO ACCEPT AND ACT UPON THEM AS ORDERS WITHOUT QUESTION.

It is impossible to make anything out of the above communications other than that they are routine orders or directions issued from the Office of Price Administration. At the time these directions were issued Revised Maximum Price Regulation No. 330 was not available to the defendants, but the District Price Executive (Mr. R. C. Mills) knew what was in it because both communications state, "according to the revised regulation" and further "in conformance

with Maximum Price Regulation No. 330." These communications further state, "on or after November 15, 1944, you may not sell any garments subject to this regulation unless you have received an acknowledgement from the OPA of the filing of your pricing chart."

Assuming for a minute that the defendants are correct in their contention that these communications were orders, then there is absolutely no question but that Mr. R. C. Mills, the District Price Executive, was acting within the scope of his authority when he sent these communications to the defendants (R. 46 and 47), but in this instance it turns out that these orders were wrong and Mr. Mills had made a mistake, so the Office of Price Administration takes the position that the communications of the District Price Executive were not orders or directions but opinions which, under the authority of Revised Procedural Regulation No. 1, §55(b), he had no right to give.

Appellant on page 8 of his brief states that these communications were clearly inapplicable to the defendants since the revised regulation prescribed an entirely different base, and if they had any doubt they should have applied for an official interpretation (page 9, Appellant's brief). You cannot possibly read this inapplicability into or from these communications. They appear on their face to be exactly in point with the defendants' business, and if the inapplicability is so clear, why did not Mr. Reed C. Mills see it. He had access to the revised regulations while the defendants in this case did not have.

APPELLANT'S AUTHORITIES NOT IN POINT

The appellant, when citing these authorities, assumes that the above referred to communications are opinions wrongfully delivered by an agent acting beyond and outside of the scope of his authority, and further, upon the erroneous belief that the defendants are relying upon the defense of good faith alone.

Under the rulings of the various Circuit Courts of Appeal, as laid down in the cases of

Crary v. Porter, decided Oct. 4, 1946 (not yet reported);

Fontes v. Porter, 156 F.(2d) 956;

Bowles v. Hastings (5 C.C.A.) 146 F.(2d) 94;

and others, good faith, alone, or standing by itself, is not a defense, but merely can be pleaded as mitigation of damage.

Appellant then makes the statement that the appellees have no right to rely on mimeographed notices (Appellant's Br. 10) and cites:

Wells, Lamont Corporation v. Bowles (U. S. Emergency C. of A.) 149 F.(2d) 364;

Schreffler v. Bowles (10 C.C.A.) 153 F.(2d) 1, and

Bowles v. Indianapolis Glove Company (7 C.C.A.) 150 F.(2d) 597;

to sustain his contention.

In the *Wells, Lamont* case, *supra*, Mr. Wells sought

advise from the Chief of the Work Clothing Unit of OPA, who advised him that his published prices were the ceilings. Mr. Wells relied upon this oral advice, and the court held that he should not have done so.

In *Schreffler v. Bowles, supra,* there is the same set of facts. "R. E. Schreffler sought and obtained from one F. R. Wildmer, an employee of the OPA, in Washington, D. C., advise as to his rights to charge the prices in question." The court held he should have followed the prescribed method of obtaining an opinion.

In *Bowles v. Indianapolis Glove Company, supra,* the defendant relied upon a letter from the OPA to establish his defense of estoppel, which is published in part in the court's opinion. In this letter the writer states that he is in doubt as to the defendant's position, but that in no way does the letter validate the prices charged by the defendant.

In none of the foregoing cases did the defendants receive a direct order to do or refrain from doing something, and in each case the court held that the defendant sought an opinion and that he should have gone through channels to get it.

The defendants herein submit to the Court that the case of *Bowles v. Griffin* (5 C.C.A.) 151 F.(2d) 458, 460, is more nearly in point with the case at hand. In this case the Rent Director made an order based on the landlord's affidavit that the rent charged was $9.00 per week. Later the Director decided the affidavit was false, and made another order to the effect that $20.00 per month was the proper charge.

This action was brought for the overcharge made during the periods between the first and second orders, and the court held:

> "The penalties, for they are such (*Thierry v. Gilbert*, 1 Cir., 147 F.2d 603; *Lambur v. Yates*, 8 Cir., 148 F.2d 137), sued for here under Sect. 205(e) are recoverable only 'if any person selling a commodity violates (note the present tense) a regulation, order, or price schedule prescribing a maximum price,' the receipt of rent for the use of a house being expressly declared to be deemed a selling of a commodity; and Sect. 205(d) declared as a defense that 'No person shall be held liable for damages or penalties * * * on any grounds for or in respect of anything done * * * in good faith pursuant to any provision of this Act or any regulation, order * * * of the Office of Price Administration * * * notwithstanding that subsequently such provision, regulation, or order * * * may be modified, rescinded, or determined to be invalid.' In this case as to each transaction of rent collection which is proven the district court has the jurisdiction and the duty to decide whether or not it was done in violation of any regulation or order existing at the time; and if at that time it was done in good faith pursuant to an order then in force, a defense is to be held established although the order has since been rescrinded. Its enquiry on these points cannot be cut off and foreclosed by fact finding of the Administrator." *Bowles v. Griffin*, 151 F.(2d) 458, 460.

It seems clear that the District Price Executive had authority to give an order (R. 46 and 47). Also see *Bowles v. Griffin*, 151 F.(2d) 458, 460, wherein the court states:

"It is suggested in oral argument that these special orders made by a Rent Director are not regulations or orders of the Administrator referred to in Section 204(d). That subsection denies jurisdiction to any court, except the Emergency Court, 'to consider the validity of any such regulation, order, or price schedule.' The regulations and orders are those authorized in Section 2, and again more broadly in Sect. 201 (d): 'The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.' These Sections speak of the Administrator alone, but manifestly one man, while he could make the general provisions usually referred to as regulations, could not himself make all the determinations of more limited or individual application which are usually spoken of as orders. Accordingly Section 201(a) provides: 'The Administrator may * * * appoint such employees as he deems necessary in order to carry out *his functions and duties* under this Act * * * and may utilize and establish such regional, local, or other agencies * * * as may from time to time be needed.' Section 201(b), after locating his principal office in the District of Columbia, declares: 'but he or any *duly authorized representative* may exercise *any or all of his powers* in any place.' (Italics added.) The Administrator could appoint a Rent Director for this Defense Area and authorize him to fix by orders maximum rents for the housing accommodations therein."

PRINCIPLE OF ESTOPPEL APPLIES TO THIS CASE

That the principle of estoppel can apply to the plaintiff is made clear in the case of *U. S. v. Denver & R. G. W. R. Co.* (8 C.C.A.) 16 F.(2d) 374, 376, in which the court said:

> "The equitable claims of the State or the United States are no stronger than those of an individual under like circumstances and a State or the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim."

Also see *Fritch v. U. S.* (9 C.C.A.) 234 Fed. 608, 236 Fed. 133.

That the principle of estoppel can apply to the Administrator of the OPA is made clear in the case of *Bowles v Griffin, supra.* All of the necessary elements of an estoppel are present in the instant case.

NEITHER THE APPELLANT NOR THE PUBLIC HAS SUFFERED ANY DAMAGE

The only parties who have suffered any damage in the matter of this alleged violation are the defendants, not the public.

The defendants started their business in December, 1943, and filed a pricing chart to which the appellant has no objection and concedes is correct.

During the first four months of their business they actually sold merchandise under these published ceiling prices (R. 58) which, of course, is not contrary to OPA regulations. Revised Maximum Price Regula-

tion No. 330, above referred to, provided the defendants should use sale prices of the first four months of their operation for their base instead of the published ceiling prices filed in December, 1943. Under the last OPA ruling they are bound with their generosity, but in no instance did the public pay a higher price than the defendants had a right to charge or would have had a right to charge had they not put their prices under their authorized ceilings during the first four months.

These last above mentioned facts clearly show that Revised Maximum Price Regulation No. 330 is arbitrary and discriminatory as it has the effect to force the defendants in this case to sell the same goods for less than their competitors can sell them, and could lawfully have hold them under OPA regulations.

The defendants are aware of the fact that they are in the wrong court to have the Revised Maximum Price Regulation No. 330 set aside on the grounds that it is arbitrary or discriminatory under §204(d).* However, these facts are all contained in the record (R. 56, 57 and 58) and the conclusion is obvious.

CONCLUSION

The whole case turns on the proposition of whether the communications of September 14 and October 7, above referred to, were orders or opinions. There can be no question but that they were intended as orders when written, which then raises the question as to whether or not the Administrator can now say that since the orders were wrong they became opinions

which are not binding on the Administrator because the District Price Executive was not authorized to give an opnion. If the court decides these communications were orders, then the defendants urge the court that the Office of Price Administration is estopped to bring this action under the authorities above cited, and particularly the case of *Bowles v. Griffin, supra,* and the decision of the District Court should be affirmed.

Respectfully submitted,

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ROSCOE KRIER,
Attorneys for Appellees.

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*Title 50 App. 924, §§(b) & (d) U.S.C.A.